

lit.

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

ROBERTA ELDRIDGE, PEGGY)
SWENDSEN, CHUCK HAZELTON,)
ROBERT KLINGENBERG, ANNE RYAN)
SHIGLEY, KAREN MAJKUT, MARK)
EIKLAND, KARL and MARY)
NYSTROM, and CITIZEN ADVOCATES)
FOR RESPONSIBLE DEVELOPMENT)
(C.A.R.D.),)

Appellants,

v.

CITY OF STANWOOD,

Respondent.

SHB NOS. 91-62 & 70

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter involves two appeals. One is the appeal of a shoreline substantial development permit issued retroactively by the City of Stanwood for a pump station and alteration of the course of Irvine Slough, numbered SHB No. 91-70. The appeal of Stanwood's issuance of a shoreline substantial development permit for a bank building along Irvine Slough, numbered SHB No. 91-62, was partially settled, on the condition the Board decide a Petition for Declaratory Ruling on one legal issue. The appeals were consolidated for hearing.

The Shorelines Hearings Board held a formal hearing on the merits in the City of Stanwood on April 8, 1992, and in Lacey on April 9-10, and 23, 1992. Present for the Board were Attorney Member Judith A. Bendor, Presiding; Harold S. Zimmerman, Chairman, and Members Annette S. McGee, Nancy Burnett and Richard Gidley.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
SHB NOS. 91-62 & 70

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2 Appellants Roberta Eldridge, et. al., were represented by Attorney Julian C. Dewell
3 (Anderson Hunter; Everett). Respondent City was represented by Attorneys John C.
4 McCullough, and Tad H. Shimazu (Heller Ehrman; Seattle), and Attorney Henry Chapman.
5 A court reporter affiliated with Bartholomew, Moughton & Associates provided court
6 reporting services in Stanwood. Robert Lewis & Associates provided court reporting services
7 in Lacey. The Shorelines Hearings Board went on a site visit with the parties, but took no
8 evidence then.

9 The Board heard evidence, reviewed exhibits, read argument and deliberated. From
10 the foregoing, on May 12, 1992, the Board announced an oral ruling, and directed respondent
11 City to prepare a proposed decision. This was filed on May 20, 1992. On May 22, 1992,
12 appellants filed Objections. On June 1, 1992, respondent filed a response.

13 Having considered the foregoing, the Board now issues these:

14 FINDINGS OF FACT

15 I

16 The cases arise in the City of Stanwood ("Stanwood"), which is located in Snohomish
17 County.

18 II

19 Irvine Slough is a narrow drainage channel running east to west, generally parallel to
20 the Stillaguamish River and south of State Road 532 in and near Stanwood. It is within the
21 100-year floodplain of the River.

22 III

23 The sides of Irvine Slough's channel are vegetated with blackberry brambles, other
24 non-wetland type vegetation. and some cattails. No evidence was presented of a predominance
25 of hydrophytic vegetation. No evidence was presented of hydric soil.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
SHB NOS. 91-62 & 70

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2 IV

3 The channel of Irvine Slough shows no sign of scouring or erosion typically associated
4 with floodways. There was no evidence that Irvine Slough has changes in surface soil
5 condition or changes in types or quality of vegetative ground cover condition.

6 V

7 Irvine Slough is also part of Stanwood's storm drain system, collecting stormwater
8 from city streets and channeling stormwater to the Stillaguamish River. The storm sewers that
9 enter Irvine Slough from the city streets have flap gates. When flood waters in the slough rise
10 above these flap gates, the City's drain system backs up.

11 VI

12 Irvine Slough is isolated from the Stillaguamish River by dikes. The Slough has tide
13 gates which prevent tidal influence on the Slough from the Stillaguamish River. These
14 conditions predate the 1971 adoption of the Shoreline Management Act ("SMA").

15 Since Irvine Slough is within the 100-year floodplain of the Stillaguamish River, it
16 periodically has flood waters within it as does the rest of the floodplain.

17 VII

18 Prior to the construction of the new pump station in or about 1979-80, Irvine Slough
19 discharged by gravity to the Stillaguamish River through the river dikes by way of two pipes,
20 each approximately 20" to 24" in diameter, with tide gates on the river side. The tide gates
21 allowed discharge to the River only when the Stillaguamish River levels were lower than the
22 water level in Irvine Slough.

23 VIII

24 Prior to the construction of the new pump station in or about 1979-80, there was also a
25 spillway/bypass adjacent to the two pipes. The spillway was about seven to ten feet wide and
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1
2 four feet deep. The spillway was generally dammed by a plywood gate. On occasion, during
3 times of extreme flooding in the area, the plywood gate was removed to allow water to flow
4 out of the Slough into the Stillaguamish River. This practice was effective only when the
5 water level in the River was lower than the water level at the bottom of the plywood gate.

6 IX

7 During flood events when the Stillaguamish River floods over its banks east of
8 Stanwood, the flood waters travel west toward Stanwood on the landward side of the river
9 dikes, parallel to the river.

10 X

11 High volumes of flood water entering Irvine Slough cannot be channeled out very
12 quickly. Under such circumstances, Irvine Slough becomes virtually useless as Stanwood's
13 storm drain system. The flood water raises the water levels in Irvine Slough above the storm
14 drain flap gates.

15 XI

16 In 1979, because of the problems that flood waters in Irvine Slough caused to the city
17 storm drain system, Stanwood began constructing a pump station and tide gates to replace the
18 gravity discharge and to aid in discharging the flood waters from Irvine Slough to the
19 Stillaguamish River. The construction was completed in 1979-1980.

20 XII

21 Stanwood also rerouted Irvine Slough so that the Slough has a more direct route to the
22 river. The relocation was completed in 1980.

23 XIII

24 The pump station construction in 1979-80 has three tide gates which discharge by
25 gravity. Two of the tide gates are 30" x 60" in size. The third tide gate is 42" x 30".
26

1
2 XIV

3 In addition to the gravity discharge, the pump station has two pumps which are capable
4 of discharging water from Irvine Slough even when the relative water level of the River is
5 higher than the water level in Irvine Slough.

6 XV

7 The pump station and portions of the Irvine Slough that were relocated are within 200
8 feet of the ordinary highwater mark of the Stillaguamish River.

9 XVI

10 The area in which the pump station was constructed and portions of the Irvine Slough
11 that were relocated, were annexed by Stanwood prior to Stanwood's adoption of its Shoreline
12 Master Program ("SMP") in 1976.

13 XVII

14 There is no evidence that Stanwood obtained a shoreline substantial development permit
15 prior to construction of the pump station and relocation of the slough in 1979-80.

16 XVIII

17 On August 6, 1991, Stanwood issued a Determination of Nonsignificance ("DNS")
18 regarding the construction of the pump station and tide gates, and the relocation of Irvine
19 Slough which was accomplished in 1979-80.

20 XIX

21 On October 21, 1991, Stanwood approved an "after the fact" shoreline substantial
22 development permit for the 1979-80 construction of the pump station and tidegates, and the
23 relocation of Irvine Slough.

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2 XX

3 The evidence indicates that the new pump station and tidegates construction in 1979-80
4 provide at least an equal discharge capability from Irvine Slough to the River.

5 XXI

6 The 1979-80 construction of the pump station and tidegates, and the relocation of
7 Irvine Slough, did not cause significant adverse environmental impacts.

8 XXII

9 Some portions of Irvine Slough, east of the 1979-80 improvements, were annexed by
10 the City of Stanwood subsequent to the adoption of its SMP in 1976. The 1979-80 pump
11 station improvements were located on property annexed by Stanwood prior to 1976.

12 XXIII

13 The Stanwood SMP has not been amended since its adoption in 1976.

14 XXIV

15 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

16 From these Findings of Fact, the Board makes these:

17 CONCLUSIONS OF LAW

18 I

19 We review the shoreline substantial development (construction of the pump station and
20 the relocation of Irvine Slough) for consistency with the City of Stanwood Shoreline Master
21 Program and the Shoreline Management Act. RCW 90.58.140(2)(b).

22 We also review the development for compliance with the State Environmental Policy
23 Act, Chapt. 43.21C RCW.

24 Appellants have the burden of proof in this proceeding. RCW 90.58.140(7).

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2 II

3 We conclude the 1979-80 construction of the pump station and tide gates, and the
4 relocation of Irvine Slough did not cause significant adverse environmental impacts.

5 Stanwood retroactively complied with the procedural and substantive requirements of
6 the State Environmental Policy Act ("SEPA") in issuing the DNS and approving the shoreline
7 substantial development permit for this project.

8 III

9 The Shoreline Management Act at RCW 90.58.030(2)(g) defines "floodway" as:

10 those portions of the area of a river valley lying streamward from the outer
11 limits of a watercourse upon which flood waters are carried during periods of
12 flooding that occur with reasonable regularity, although not necessarily
13 annually, said floodway being identified, under normal condition, by changes in
14 surface soil conditions or changes in types or quality of vegetative ground cover
15 condition. The floodway shall not include those lands that can reasonably be
16 expected to be protected from flood waters by flood control devices maintained
17 by or maintained under license from the federal government, the state, or a
18 political subdivision of the state.

16 The Stanwood SMP defines "floodway" as:

17 those lands located inside of the dikes or levees which border the Stillaguamish
18 Estuary. Stanwood SMP at VI, 7, p. 37.

19 We conclude that under the SMA and the Stanwood SMP, those portions of Irvine Slough
20 landward 200 feet from the Stillaguamish River are not a "floodway".

21 IV

22 The shoreline substantial development permit is not inconsistent with the SMA, or
23 Stanwood's SMP.

V

In the Petition for Declaratory Judgment, the issue was raised as to whether Irvine Slough is a "shoreline" as that term is used at RCW 90.58.030(2) of the SMA. This issue is governed by RCW 90.58.030(2)(f) and (2)(g), as implemented by WAC 173-22-030(2) and WAC 173-22-040(2).

The portion of Irvine Slough within 200 feet of the Stillaguamish River is, by operation of statute, a "wetland associated" with the Stillaguamish River and is, therefore, a "shoreline of the state."

We conclude Irvine Slough landward 200 feet from the Stillaguamish River's ordinary high water mark, is not a marsh, bog, swamp. It is not a "wetland" under RCW 90.58.030(2)(f) or the Stanwood SMP, VI, 17 p. 39.

Those portions of Irvine Slough landward 200 feet from the Stillaguamish River ordinary high water, which were annexed to the City prior to the adoption of the Stanwood SMP in 1976, are subject to the Stanwood SMP and the SMA. We conclude these portions of the Slough are not "shorelines of the state" under the SMA or Stanwood's SMP.

VI

Those portions of Irvine Slough that are still, or were formerly within unincorporated Snohomish County subsequent to the adoption of the Stanwood SMP in 1976, are subject to the provisions of the Snohomish County Shoreline Master Program until the Stanwood SMP has amended its SMP to include such areas and the Department of Ecology approves such amendment. WAC 173-14-044.

The Snohomish County Master Program, pursuant to RCW 90.58.030(f), includes the 100-year flood plain of the River in its definition of wetland, whereas the Stanwood Master Program does not. Snohomish County Code 21.08.210; Stanwood Code 17.92.010(d). These

1 portions of Irvine Slough that are still, or were formerly within the unincorporated Snohomish
2 County subsequent to the adoption of the Stanwood SMP in 1976, are therefore, "wetlands"
3 and "shorelines of the state" pursuant to the Snohomish County Master Program.
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5 VII

6 It is beyond this Board's jurisdiction to conclude whether a flood zone permit was or
7 was not issued and whether there was a violation of State or local law in that regard.

8 VIII

9 Appellant's contention that the Stanwood Shoreline Master Program's definition of
10 "floodway" and "wetlands" are inconsistent with the SMA definitions. This appears to be a
11 facial challenge to the SMP, which is a challenge properly filed in Superior Court. RCW
12 90.58.180(5). Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as
13 such.

14 From these Findings of Fact and Conclusions of Law, the Board enters this:
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ORDER

The shoreline substantial development permit granted by the City of Stanwood for the construction of the pump station and the relocation of portions of the Irvine Slough is hereby AFFIRMED.

DECLARATORY ORDER

Those portions of Irvine Slough 200 feet landward of the River's Ordinary High Water Mark which were annexed to the City of Stanwood, subsequent to 1976 are "shorelines of the state" under the Snohomish County Shoreline Master Program due to its location within the Stillaguamish River 100-Year Flood Plain.

DONE at Lacey, Washington, this 10th day of June, 1992.

SHORELINES HEARINGS BOARD

Judith A. Bendor
JUDITH A. BENDOR, Presiding

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Chairman

Annette S. McGee
ANNETTE S. MCGEE, Member

Nancy Burnett
NANCY BURNETT, Member

Richard Gidley /by JB/
RICHARD GIDLEY, Member

S91-62F

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

ROBERTA ELDRIDGE, et. al.,)	
)	
Appellants,)	SHB Nos. 91-62 & 91-70
)	
v.)	
)	DECISION AND ORDER
CITY OF STANWOOD,)	DENYING MOTION FOR
)	PARTIAL SUMMARY JUDGMENT
Respondent.)	

On August 6, 1991, the City of Stanwood issued a retroactive Declaration on Non-Significance ("DNS") under the State Environmental Policy Act ("SEPA") regarding construction in 1981 and 1982 of a drainage pump station and relocation of a portion of Irvine Slough. It is undisputed that appellants did not appeal this DNS to the City Council.

On October 21, 1991, the City approved an "after the fact" shoreline substantial development permit for the 1981-82 pump station construction and slough relocation. On November 15, 1991, appellants filed an appeal with this Board, which became SHB No. 91-70. The appeal also challenged compliance with SEPA. This appeal was consolidated with an earlier appeal, SHB 91-62.

On December 13, 1991, the Shoreline Hearings Board held a pre-hearing conference on these consolidated appeals. As a result of the conference, a pre-hearing order issued which among other matters, listed legal issues. Legal Issue No. 4 states:

4. Did the City comply with SEPA?

a. Are appellants barred from raising SEPA due to failure to exhaust administrative remedies?

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2 On February 10, 1992, respondent City filed a Motion to Dismiss this Legal Issue,
3 along with a Memorandum in Support, Declaration of Robert Donahoe and attachments. On
4 February 20, 1992, appellants filed a Response in Opposition. The City filed a Reply.
5 Having considered the above, the Board deliberated and announced orally on March 18, 1992
6 denial of the Motion.

7 We now issue these Conclusions of Law:

8 I

9 The City of Stanwood Municipal Code at 14.54.070(5)(c) provides for an appeal of the
10 DNS to the City Council. Respondent City contends that appellant is required to appeal the
11 DNS to the City and not having done so, has failed to exhaust administrative remedies, thereby
12 requiring dismissal of the SEPA issue. The City makes this argument despite the fact both the
13 DNS and permit decisions are for actions ten years earlier.

14 II

15 In cases involving the Shoreline Management Act, SEPA overlays the shoreline permit
16 review process. Polygon v. Seattle, 90 Wn.2d 59 (1978). As the SEPA statute makes clear,
17 SEPA does not create an independent cause of action:

18 (1) Because a major purpose of this chapter is to combine environmental
19 considerations with public decision any appeal brought under this chapter shall
20 be linked to a specific governmental action. The State Environmental Policy
21 Act provides a basis for challenging whether governmental action is in
22 compliance with the substantive and procedural provisions of this chapter. The
23 State Environmental Policy Act is not intended to create a cause of action
24 unrelated to a specific governmental action.

25 RCW 43.21C.075

26 The statute further states in subsection 2:

1 (2) Unless otherwise provided by this section:

2 (a) Appeals under this chapter shall be of the governmental action together with
its accompanying environmental determinations.

3 (b) Appeals of environmental determinations made (or lacking) under this
4 chapter shall be commenced within the time required to appeal the governmental
action which is subject to environmental review.

5 RCW 43.21C.075.

6 III

7 The State Environmental Policy Act recognizes a different way for handling SEPA
8 claims in Chapt. 90.58 RCW, Shoreline Management Act cases, than all other matters:

9 Except for permits and variances issued pursuant to chapter 90.58 RCW,
10 when such a governmental action, not requiring a legislative decision, is
11 conditioned or denied by a nonelected official of a local government agency, the
12 decision shall be appealable to the legislative authority of the acting government
agency unless that legislative authority formally eliminates such appeals.

3 RCW 43.21C.060; emphasis added.

14 For shoreline cases, the SEPA statute in effect recognizes the difference between
15 appealing local government shoreline decisions and other local land use decisions. Shoreline
16 appeals are to the Shorelines Hearings Board, which hears the cases de novo. Other local land
17 use decision are appealed to Superior Court on the record.

18 III

19 If an agency has a SEPA appeal procedure, the agency is to provide for a consolidated
20 appeal of procedural issues and the substantive determination. RCW 43.21C.075(3). The
21 Shorelines Hearings Board has such a process, providing for review of both the underlying
22 permit and the SEPA determinations. WAC 461-08-175.

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2 IV

3 Appellants do not have to appeal the SEPA decision separately, within the internal city
4 process. See RCW 43.21C.075(3). Rather, they properly appealed the shoreline permit and
5 the SEPA determination together to this Board. RCW 43.21C.075(3). In so doing, Ecology
6 is properly exhausting its administrative remedies before this Board. See, Kitsap County v.
7 DNR, 99 Wn.2d 386, 391 (1983). Respondent's motion should be denied.
8 SAVE and DOE v. City of Bothell and Richard Truly, SHB Nos. 90-85 & 87. (Order Denying
9 Motions for Partial Summary Judgment; March 18, 1992).

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2 ORDER

3 Respondent's Motion for Partial Summary Judgment is DENIED.

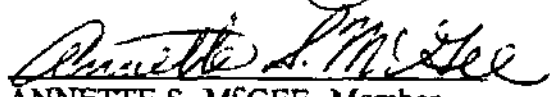
4 The trial on the merits is scheduled for April 8-10, 1992.

5 DATED this 27th day of March, 1992.

6 SHORELINES HEARINGS BOARD

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9 JUDITH A. BENDOR, Presiding

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11 
12 HAROLD S. ZIMMERMAN, Chairman

13
14 
ANNETTE S. MCGEE, Member

15
16 
NANCY BURNETT, Member

17
18 
19 MARK ERICKSON, Member

20
21 (Not available for signature)
22 ROBERT S. SCHOFIELD, Member